IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE P.R.RAMAN

THIRSDAY, THE 19TH JULY 2007 / 28TH ASHADHA 1929

CRP.No. 1091 of 2004()

AGAINST ORDER OF DISTRICT COURT, KASARGOD IN CMA.349/2002
AND IA.1712/2001 IN OS.268 OF 1997 OF MUNSIFF'S COURT, KASARAGOD

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REVN. PETITIONER: APPELLANTS/PETITIONERS/PLAINTIFFS:

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1. BEEPATHUMMA, W/O. K.M. MOHAMMED,
RESIDING AT NEERPANTHI, KUDALMERKALA VILLAGE,
KUDALMERKALA POST, KASARGOD TALUK AND DISTRICT.

2. AISAMMA, W/O. MAMMUNHI,
RESIDING AT NEERPANTHI, KUDALMERKALA VILLAGE,
KUDALMERKALA POST, KASARGOD TALUK AND DISTRICT.

BY ADV. SRI.L.GOPALAKRISHNAN POTTI
SRI.A.DINESH RAO

RESPONDENTS: RESPONDENTS/DEFENDANTS:

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1. LOLAKSHA RAO, S/O. SUBRAYA NAIKA,
RESIDING AT NEERPANTHI, KUDALMERKALA VILLAGE
KUDALMERKALA POST, KASARGOD TALUK AND DISTRICT.

2. CHANDRA SHEKHARA, S/O. SUBRAYA NAIKA,
RESIDING AT NEERPANTHI, KUDALMERKALA VILLAGE,
KUDALMERKALA POST, KASARGOD TALUK AND DISTRICT.

BY ADV. SRI.S.V.BALAKRISHNA IYER
SRI.K.JAYAKUMAR
SRI.HARISH R. MENON

THIS CIVIL REVISION PETITION HAVING BEEN FINALLY HEARD ON 19/07/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

P.R. RAMAN, J.

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C.R.P. NO. 1091 OF 2004

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DATED THIS, THE 19TH DAY OF JULY, 2007.

O R D E R

Revision petitioners are the plaintiffs in O.S. 268/1997 on the file of the Munsiff's Court, Kasaragod. The suit was for permanent injunction restraining the respondents from trespassing into the plaint schedule properties. On the date on which the suit was posted for trial, the plaintiffs were absent. The counsel reported no instruction and accordingly, the suit was dismissed for default. Thereafter, petitioners preferred I.A. 1717/2001, supported by an affidavit seeking restoration of the suit, under Order 9 Rule 9 of the Code of Civil Procedure. It was averred that the first plaintiff was conducting the suit on behalf of the other plaintiff also and on account of illness, she could not appear before the court on the day on which the case was posted. It was her case that she was suffering from Urinary Track Infection and undergoing treatment from 2.9.2001 till 10.9.2001. Medical certificate was also produced.

2. The defendants resisted the application by filing a counter affidavit inter alia contending that the alleged cause of illness of the first

plaintiff was not true to facts. The genuineness of the medical certificate was also disputed. It was the case of the defendants that the first plaintiff was found plucking coconuts from the property and therefore, the alleged illness is not true. The first plaintiff was examined as PW.1 and the medical certificate was marked as Ext.A1. On the side of the defendants, the first defendant was examined as RW.1. The learned Munsiff, after considering the materials on record, dismissed the application for restoration. The learned Munsiff observed that the first defendant, while examined as RW1, has deposed that the first plaintiff was found going to her property for plucking coconuts along with her worker and therefore, the contention of the first plaintiff that she was not keeping well could not be true. In the light of the above evidence tendered by RW.1 and despite the fact that the respondents had disputed the correctness of the medical certificate, the plaintiffs did not examine the doctor. It further held that even though admittedly, there were two plaintiffs and there was no reason forthcoming as to why the second plaintiff did not appear before the court on 5.9.2001, especially when there was no evidence to show that the second plaintiff was having any physical problem, illness or like difficulties to appear before the court. In such circumstances, it was held that the application was devoid of merits and bona fides, and the same was dismissed.

3. On appeal, the appellate court went into the prima facie case of the plaintiffs and held that A schedule item No.3 in the plaint is 13 cents lying contiguously with other two items, which is the disputed property. A schedule Item Nos. 1 and 2 are stated to have been purchased by the son of the second plaintiff who is abroad and thus, he has got possession over those two items. But the title deed executed in respect of A schedule item Nos. 1 and 2 do not support the case of the plaintiffs. It went on to hold that the plaintiffs instituted the suit without producing convincing materials to disclose their possession and enjoyment of A schedule item No. 3. It was also held that the second plaintiff could have appeared and prosecuted the suit, if for any reason, the first plaintiff was indisposed of. The appeal was accordingly dismissed, against which this revision is filed.

4. Though it is strongly contended by the learned counsel for the respondents that this revision is not maintainable because of the bar created by the proviso to Section 115 of the Code of Civil Procedure, learned counsel appearing for the petitioners/plaintiffs would contend this is an independent proceedings for restoration of the suit and since the final order is passed in the restoration application, revision is maintainable. At any rate, this court has got power under Article 226 and 227 of the Constitution of India and if the order is found to be not sustainable in the eye of law, relief should be granted. For the purpose of this case I will assume

jurisdiction without deciding the issue.

5. The suit is one for prohibitory injunction and the plaintiffs are stated to be in possession of the property even on the date of the suit. Hence no recovery is sought for. The alleged cause of action is an attempt of trespass. Several years have elapsed thereafter and if the attempt to trespass was repeated or continued, nothing prevented the petitioners from instituting a fresh suit on a different cause of action as there is no bar for instituting a fresh suit on a different cause of action. Further, the fact remains that though it was pleaded that the first plaintiff was sick on the date on which the case was posted for trial, the doctor was not examined to prove the medical certificate, in spite of the fact that the genuineness of the certificate and the reason put forth by the plaintiffs were disputed by the defendants. In such circumstances, both the courts have concurrently found that sufficient grounds are not made out to allow the prayer for restoration of the suit to file. I find that this is neither a case where there is a refusal to exercise the jurisdiction vested in the court nor is it a case where jurisdiction was exercised with any illegality. In the circumstances, I do not find any merit in the civil revision petition. The same is dismissed.

However, I make it clear that the appellate court was not correct in law, in dwelling into the merits of the plaint claim, while considering the appeal against an order of dismissal of an application for restoration of the

suit to file. The sufficiency or otherwise of the reason shown alone ought to have been adjudged. In the absence of any adjudication, such a finding ought not have been rendered since it will adversely affect the right of the parties. In the circumstances, the finding regarding the prima facie case of the plaintiffs contained in the appellate court judgment is vacated.

P.R. RAMAN,
(JUDGE)

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